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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 212

THE UNITED STATES, PETITIONER

v.

SEABOARD AIRLINE RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on May 2, 1949.

OPINION BELOW

The opinion of the Court of Claims (R. 24-28) is reported at 83 F. Supp. 1012.

JURISDICTION

The judgment of the Court of Claims was entered on May 2, 1949 (R. 28). The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the jurisdictional limitation on suits in the Court of Claims (28 U.S.C. 2501) allows carriers up to six years within which to bring actions against the United States for recovery of their charges, despite the two-year limitation on such actions in Section 16(3)(a) of the Interstate Commerce Act (41 Stat. 491-492, as amended, 49 U.S.C. 16(3)(a)).

STATUTES INVOLVED

The Interstate Commerce Act, § 16(3)(a) as amended by the Transportation Act of 1920, § 424, 41 Stat. 456, 491-492, the Act of June 7, 1924, 43 Stat. 633, and by the Transportation Act of 1940, § 11(a)(2), 54 Stat. 898, 912-913, 49 U.S.C. 16(3)(a) provides:

> All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after.

28 U.S.C. 2501, provides:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed * * * within six years after such claim first accrues.

STATEMENT

Prior to 1940, any railroad whose lines had been constructed in whole or in part with the aid of land grants was entitled to only 80 per cent of the rates

fixed by the Interstate Commerce Commission for the carriage of mail. By Section 321 of Part II of Title III of the Transportation Act of 1940, 49 U.S.C. 65, such a railroad was to become entitled to full rates for mail carriage after filing "with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States" arising out of land grants or alleged land grants.

On October 10, 1940,[1] the Acting Secretary of the Interior approved General Land Office Circular No. 480 which prescribed in detail the requirements for a valid release under Section 321. Among other things, the release was required to show whether the carrier had sold or encumbered unpatented or uncertified lands within the limits of its grant (R. 22) and to contain evidence that the released lands were free from tax debts, or, where this was not the case, to have attached to it a bond with corporate surety or cash deposit in the General Land Office insuring payment (R. 22-23). Corporate authorization for the release was also required, as was evidence of the releasing company's successorship where it had not been filed previously with the Department of the Interior (R. 23). Finally, Section 273.67 of these regulations provided that the release would not be effective to entitle the carrier to the benefits of Section 321 of the Transportation Act of 1940

[1] Through an error of no present significance, this date appears as November 10, 1940, in the findings of the court below (R. 21).

until it had been approved by the Secretary of the Interior (R. 23).

The respondent succeeded to the interests of the Seaboard Airline Railway Company on August 1, 1946 (R. 20). On November 5, 1940, the receivers then operating the Seaboard submitted a release to the Secretary of the Interior under Section 321 (R. 23). On November 27, 1940, it was approved in accordance with the Secretary's regulations (R. 23).

During November 1940, the receivers operating the Seaboard properties transported mail for the United States on Mail Routes Nos. 104807 and 104832 (R. 23). The bills submitted to the Post Office Department for this service were stated for the period from November 5 through November 26, 1940, at the full rates fixed by the Interstate Commerce Commission (R. 23). In the final settlement of these bills, however, on July 30, 1941, eight months after the service had been performed, the Post Office Department certified for payment at 80 per cent of the full rate for this period (R. 24). The carrier protested, but the payment was approved by the General Accounting Office by settlement warrant dated August 11, 1941 (R. 24).

On November 4, 1946, just short of six years after the service in question was performed and over five years after the General Accounting Office approved payment therefor, respondent instituted this action to recover the difference between the

amount it received and the amount it would have received had it been paid at full rates (R.). The Government interposed two defenses: First, that since respondent's release was not approved by the Secretary of the Interior until November 27, 1940, respondent did not become entitled to full rates for mail carriage until that date. Second, that respondent's action was barred by Section 16(3)(a) of the Interstate Commerce Act (49 U.S.C. 16(3)(a)) which requires suits by carriers for recovery of their charges to be brought within two years from the time the cause of action accrues (R. 25-26, 27). Rejecting both these defenses, the court below, on May 2, 1949, rendered judgment for $2,295.32 for respondent, holding that (1) the regulations of the Secretary of the Interior were in excess of his authority in so far as they required his approval of a release before it would entitle a carrier to full rates under Section 321; and (2) the two-year limitation of 49 U.S.C. 16(3)(a) governs only suits against private shippers and not suits against the United States, as to which the six-year limitation period for bringing suits in the Court of Claims (28 U.S.C. 2501) continues to apply (R. 26, 27-28).

REASONS FOR GRANTING THE WRIT

As construed by the Court of Claims, 28 U.S.C. 2501, which limits that court's jurisdiction to claims sued upon within six years of accrual, deprives the Government of the benefit of Section 16(3)(a) of the Interstate Commerce Act, which

specifically bars actions to recover charges by carriers subject to the Act unless brought within two years. We submit that this result not only flouts the unequivocal language of Section 16(3)(a), but is also wholly inconsistent with the decisions of this Court in *Midstate Co.* v. *Penna. R. Co.*, 320 U.S. 356 (interpreting Section 16(3)(a)) and in *United States* v. *A. S. Kreider Co.*, 313 U.S. 443 (interpreting 28 U.S.C. 2401(a), the counterpart for district court suits of 28 U.S.C. 2501).

1. The inclusive and unambiguous language of Section 16(3)(a), applying, without exception, to "All actions at law by carriers * * * for recovery of their charges," provides no warrant for excepting suits against the Government. Nor does the Court of Claims seek to justify its exclusion of the United States from the protection of this statute on the ground that the statutory terms direct such an exclusion. Indeed, in a series of decisions prior to 1926, that court expressly recognized that "the statute does apply to suits by carriers against the Government" (*Schaff* v. *United States*, 59 C. Cls. 318, 321-322), and held that it barred these suits when not brought within the prescribed period. *Lancaster* v. *United States*, 60 C.Cls. 80. See *Central R.R. Co. of New Jersey* v. *United States*, 60 C.Cls. 578, certiorari dismissed, 270 U.S. 644; *Wabash Ry. Co.* v. *United States*, 59 C. Cls. 322, affirmed, 270 U.S. 1; *Northern*

Pac. Ry. Co. v. *United States,* 59 C.Cls. 122; *Western Pac. R.R. Co.* v. *United States,* 59 C.Cls. 67, reversed on other grounds, 268 U.S. 271.

Then, in *Southern Pac. Co.* v. *United States,* 62 C.Cls. 391 (1926), where the question was scarcely touched upon in the briefs,[2] the Court of Claims overruled this line of cases, holding that, despite the inclusive terms of Section 16(3)(a), suits by carriers against the Government were to be ruled by the six-year jurisdictional statute of limitations (now 28 U.S.C. 2501) applicable to all suits in the Court of Claims. In creating this exception, the court neglected to emphasize, as it had formerly, the clear and all-embracing language Congress had chosen. Instead of recognizing at the outset that "no single argument has more weight in statutory interpretation" than the fact that the statutory language covers the case at hand (*Browder* v. *United States,* 312 U.S. 335, 338), the court adopted as a major premise the principle that repeals by implication are disfavored, and reasoned therefrom that the absence in Section 16(3)(a) of language *expressly applicable to suits in the Court of Claims* was a significant argument for its inapplicability. It is

[2] Apart from the fact that the Court of Claims had already decided this point favorably to the Government, there were then pending in this Court two cases in which it was hoped this question would be finally resolved. But this Court held that Section 16(3) did not apply retroactively and found it unnecessary to decide the question here presented. *United States* v. *St. Louis, S. F. & T. Ry. Co.,* 270 U. S. 1 (Jan. 18, 1926).

submitted that the court's major premise was irrelevant to the problem before it, and that it erred in its conclusion because of its erroneous choice of a starting-point for its inquiry.[8]

Judicial reluctance to find statutory repeals by implication is limited by the well-defined principle that a statute applicable to a specific class of cases will, within that class, supersede a more general statute. *MacEvoy Co.* v. *United States,* 322 U. S. 102, 107; *Shelton* v. *United States,* 165 F. 2d 241 (C.A. D.C.). This principle, precisely relevant here, has operated to bar suits against the Government brought within the six-year jurisdictional limitation period but not within the lesser period prescribed for the cause of action under a specific statute. *United States* v. *A. S. Kreider Co.,* 313 U. S. 443 (five years, under Revenue Act of 1926, § 1113(a), 44 Stat. 9, 116); *Christie-Street Commission Co.* v. *United States,* 136 Fed. 326 (C.A. 8) (two years, under R.S. 3227, 26 U.S.C. 3772); *Kahn* v. *United States,* 55 C. Cls. 271, affirmed, 257 U. S. 244 (same); *Fort Pitt Gas Co.* v. *United States,* 49 C. Cls. 224 (same); cf. *Mejia* v. *United States,* 152 F. 2d 686 (C.A. 5), certiorari denied, 328 U. S. 862 (one year, Louisiana wrongful death statute). In *United States* v. *A. S. Kreider Co., supra,* referring to the provision in § 24(20) of the

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[8] Since the court below rests the instant decision upon the reasoning in *Southern Pac. Co.* v. *United States, supra,* the discussion here focuses on the arguments adduced in that opinion.

Judicial Code (now 28 U.S.C. 2401(a)), fixing for Tucker Act suits in the district courts the same general six-year limitation applicable in the Court of Claims, this Court said (313 U. S. at 447):

> We think the quoted language was intended merely to place an outside limit on the period within which all suits might be initiated under § 24(20). Clearly, nothing in that language precludes the application of a different and shorter period of limitation to an individual class of actions even though they are brought under § 24(20). Phrasing the condition negatively, Congress left it open to provide less liberally for particular actions which, because of special considerations, required different treatment.

Earlier, employing an identical analysis, the Court of Claims had reached similar results. *Kahn* v. *United States, supra,* at 286; *Fort Pitt Gas Co.* v. *United States, supra,* at 234.

The Court of Claims has sought to distinguish its decision in the *Fort Pitt Gas Co.* case by pointing out that the two-year statute of limitations there involved contained the words "in any court," that it therefore indicated "a clear intention to prescribe a definite limitation in all courts." *Southern Pac. Co.* v. *United States,* 62 C. Cls. 391, 398. We submit that this purported distinction is wholly without merit. The reach of Section 16(3)(a) extends to "all actions at law". It is difficult to conceive how these terms, in their present

context, can be regarded as less inclusive than "actions * * * in any court." The suggestion that Section 16(3)(a) does not cover actions in the Court of Claims because it does not refer to "any court" could presumably be invoked by every state court whose statute of limitations it supersedes. To state this possibility is to reject it, and to reject along with it the corresponding argument of the court below.

Beginning with the erroneous assumption that to bar suits against the Government under Section 16(3)(a), the plain language of which directed such a result, would effect an impermissible "repeal by implication" of the statute restricting jurisdiction of the Court of Claims to actions brought within six years, the court below was led to attribute to other portions of the Interstate Commerce Act a significance opposite from that which would seem appropriate. The court observed that the Act provides for two exceptions with respect to Government transportation: 49 U.S.C. 22, permitting carriers to provide such transportation free or at reduced rates; and 49 U.S.C. 3(2), permitting extension of credit to the Government without authorization by the I.C.C.[4]

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[4] Whatever weight might conceivably have been attributed prior to 1940 to the provision permitting extension of credit to the Government would have disappeared with the congressional directive that payment for government transportation "shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office." Transportation Act of 1940, Title III, Part II, § 322, 54 Stat. 955, 49 U.S.C. 66.

From these exceptions, which Congress knew how to make expressly when it desired special treatment for Government transportation, the court below drew the inference that the Government was intended to be excepted from the operation of Section 16(3)(a), where Congress made no exception of any kind.

The error in this reasoning is, we submit, readily apparent. The express exceptions for government transportation in unrelated portions of the Interstate Commerce Act, are, at the very least, irrelevant to the question whether Section 16(3)(a) applies to suits against the United States. If anything, these explicit exceptions would support the contrary conclusion that none were to be implied elsewhere in the Act.[5]

2. It is submitted that the Court of Claims, in *Southern Pac. Co.* v. *United States,* 62 C. Cls. 391, 399, 403, committed the fallacy referred to by this

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[5] This latter conclusion has been adopted by the Interstate Commerce Commission, the repeated recommendations of which were followed by Congress in enacting, in the Transportation Act of 1920, the limitation provisions in Section 16(3). See the following Annual Reports of the I.C.C.: No. 27 (1913) pp. 80-81; No. 28 (1914) p. 65; No. 29 (1915) p. 68; No. 31 (1917) p. 68. In *United States* v. *Director General,* 80 I.C.C. 143, 150-151, that agency, whose interpretations of Interstate Commerce Act provisions recommended by it to Congress are entitled to even more than their ordinarily "great weight" (*United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 549), held that there was nothing in the Act's exceptions with respect to the Government which would warrant implying one where none had been expressed. Indeed, it stressed specific exceptions elsewhere in the Act as a basis for its decision that the language of Section 16 even included the Government as plaintiff.

Court in *Midstate Co.* v. *Penna. R. Co.*, 320 U. S. 356, at 365-366, of "assuming * * * that * * * section [16(3)] reflects only the Act's general policy against discrimination in respect to rates, rebates, etc." while overlooking that "this is true only so far as that policy is consistent with the particular policy laid down by the section, namely, that of strictly limiting the time within which claims may be asserted * * * ." This "particular policy" would seem to be at least as relevant to suits against the Government as to suits against any other shipper.

Ignoring the special purpose of Section 16(3), the court below has ignored as well the unbroken series of decisions in which this Court has enforced that purpose by holding that the section's limitations put terms to the substantive rights they govern. Lapse of the specified time does not merely bar the remedy sought; it destroys the asserted right. *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, 667-668; *Louisville Cement Co.* v. *Int. Com. Comm.*, 246 U. S. 638, 642; *Kansas City So. Ry.* v. *Wolf*, 261 U. S. 133, 138-140; *William Danzer Co.* v. *Gulf R.R.*, 268 U. S. 633, 636; *Midstate Co.* v. *Penna R. Co., supra.*

When *Southern Pac. Co.* v. *United States, supra,* was decided, this Court had not yet applied this uniform substantive characterization specifically to subdivision (a) of Section 16(3), limiting suits by carriers against shippers. But this specific ex-

tension, following inevitably from the consistent construction of Section 16(3), came in *Midstate Co.* v. *Penna. R. Co., supra.* In adhering to its *Southern Pacific* decision, the court below endows the merely "negative" restriction (see p. 9, *supra*) of 28 U.S.C. 2501 with the power of reviving a cause of action which no longer exists. 28 U.S.C. 2501 does not begin to operate unless there is involved a "claim of which the Court of Claims has jurisdiction * * * ." As applied below, this statute has had the startling effect of creating a right where there was no "claim" to which Court of Claims jurisdiction could attach. Cf. *Finn* v. *United States,* 123 U. S. 227, 232; *Phillips* v. *Grand Trunk Ry.,* 236 U. S. 662, 667.

3. In adhering to its decision in *Southern Pac. Co.* v. *United States, supra,* the court below suggests that the subsequent failure of Congress to change Section 16(3)(a) constitutes implied approval of the holding in that case (R. 27-28). As this Court has frequently declared, however, particularly where statutory language is clear and unambiguous, there is no reason to "expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation." *Jones* v. *Liberty Glass Co.,* 332 U. S. 524, 534; cf. *Helvering* v. *Hallock,* 309 U. S. 106, 119-120.

Of greater significance than congressional silence is the recent Act of June 29, 1949, Pub. L. No. 138,

81st Cong., 1st sess., which adds to Parts II, III and IV of the Interstate Commerce Act (covering, respectively, motor carriers, water carriers and freight forwarders) provisions establishing the same limitations as those in Part I, Section 16(3). This statute is designed to establish uniformity among the four parts of the Act. S. Rep. No. 83, 81st Cong., 1st sess., p. 1; H. Rep. No. 766, 81st Cong., 1st sess., pp. 1-2. The language used in fixing periods of limitation is, except for insignificant changes of phraseology, the same as that of Section 16(3). Speaking of these sections in an identical predecessor bill (H.R. 2759, 80th Cong., 1st sess.), Congressman Wolverton, Chairman of the House Committee on Interstate and Foreign Commerce and sponsor of the bill, declared unequivocally that their terms would apply to the Government.[6] Later, the House Committee, in reporting the bill which was enacted (S. 257, 81st Cong., 1st sess.), reserved judgment as to whether these provisions "apply to proceedings *instituted by the United States* but * * * left that question for determination judicially as appropriate cases may arise." H. Rep. No. 766, *supra,* at p. 2 (italics supplied).

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[6] "Mr. WOLVERTON. * * * I think it clear that the limitations for which the bill provides would apply to the United States as a shipper, just as to any other shippers. * * * I think, too, that there is every reason why these limitations should apply to the United States the same as to any other shipper." 94 Cong. Rec. 131.

The I.C.C., adhering to its position in *United States* v. *Director General, supra,* shares this view. *Ibid.*

Even if Chairman Wolverton's remarks are to be read, in the light of the Committee report, as applying to the more difficult cases in which the United States is plaintiff, it is absurd to attribute to Congress the view that the short statute bars the United States as plaintiff but does not protect it as defendant. *Stanley* v. *Schwalby*, 147 U. S. 508, 515-517. Cf. *United States* v. *Interstate Commerce Commission*, No. 330, October Term, 1948. Congressional sentiment ranges, rather, from a rejection of the *Southern Pacific* decision and the decision below to a belief that the applicability of the Interstate Commerce Act limitations provisions to cases in which the United States is a party remains an open question. This state of the Congressional mind underlines the need for clarification by this Court.

4. The importance of the question herein, enhanced by recent Congressional action (Point 3, *supra*), can be measured by the Government's enormous expenditures for transportation and by the inevitable mass of litigation to which they give rise. An authoritative ruling by this Court is needed to determine whether the Government, prepared to pay cash for its transportation (49 U.S.C. 66), is to be subjected to suits up to four years later than similar suits must be brought against private shippers, with all the attendant disruption of Governmental fiscal management which this discrimination implies. Such a ruling will serve to dispose of

a great number of cases now pending, not only in the Court of Claims,[7] but in the district courts as well,[8] in which the Government has interposed or will interpose the defense of Section 16(3)(a).

Moreover, apart from the Government's interests as shipper, it is important to determine whether the "paramount policy of § 16 * * * to secure promptness in collection * * *" (*Midstate Co.* v. *Penna. R. Co.*, 320 U. S. 356, 367) is to be emasculated by being made inoperative as to the largest single client of the nation's carriers.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JULY, 1949.

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[7] E.g., *Union Pac. R. Co.*, No. 46989; *Chicago & Eastern Ill. R. Co.*, No. 47575; *Pennsylvania R. Co.*, No. 48473; *Atlantic Coast Line R. Co.*, No. 48825.

[8] E.g., *Chicago & Northwestern Ry Co.* v. *United States*, E.D. Wis., Civil No. 4513; *Northern Pac. Ry Co.* v. *United States* (3 cases), D. Minn., Civil Nos. 1099, 1105, 1106; *New York, Chicago & S. L. R.R. Co.* v. *United States*, N.D. Ohio, Civil No. 26337; *Pacific Electric Ry. Co.* v. *United States*, S.D. Cal., Civil No. 7821-BH.

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No. 212.

IN THE

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OCTOBER TERM, 1949.

THE UNITED STATES, *Petitioner*

v.

SEABOARD AIR LINE RAILROAD COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SEABOARD AIR LINE RAILROAD COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Seaboard Air Line Railroad Company, the respondent, respectfully represents that the petition for writ of certiorari filed by the Solicitor General presents an erroneous and unsubstantial question for review, is without merit and should be denied.

The Question Presented Is Erroneously Stated by the Petition.

The petition (p. 2) inaccurately states that the question involved is whether the jurisdictional limitation on suits in the Court of Claims (28 U. S. C. 2501) allows carriers up to six years within which to bring actions against the

United States *"for recovery of their charges,"* despite the limitation of two years contained in the Interstate Commerce Act.

This is an unwarranted broadening of the precise and far narrower issue involved in this case, namely, whether an action for mail pay, not common carrier charges, is governed by the six-year or by the two-year limitation.

Statutes Involved.

The petition makes no reference to the basic statute upon which the respondent's action in the Court of Claims was founded, viz., the Mail Pay Act of 1916, 39 Stat. 429-30; 39 U. S. C. Chap. 15, as amended by Section 321 of the Transportation Act of 1940.

Statement.

It is perhaps understandable that the petition addresses itself to an issue which is not actually presented by the record, since the Court of Claims (83 F. Supp. 1012; R. 24-28) failed to deal with the precise issue in its opinion, ignoring the special character of the claim presented.*

The opinion of the Court of Claims and the petition here, are grounded upon the plainly erroneous assumption that the services of the railroads in transportation of the mails are indistinguishable from their common carrier functions in the transportation of freight, and that their charges for both classes of service are based upon the Interstate Commerce Act. The decision of the Court of Claims, that the action for mail pay is limited only by the six-year provision of 28 U. S. C. 2501, is clearly correct, for reasons which that Court did not choose to state.

This action is not one for "a carrier's charges" within the meaning of Section 16 (3) (a) of the Interstate Com-

* The Government raised the limitation question in the Court below for the first time in its brief and the defendant dealt with the special character of a mail pay case in its reply brief.

merce Act. The railroads do not act as common carriers in transporting the mails.

In *A. T. & S. F. Railway* v. *U. S.*, 225 U. S. 640, 649, this Court said:

> "The company in carrying the mails was not handling freight, nor was it acting as a common carrier, with corresponding rights and liabilities, but in this respect it was serving as an agency of the Government..."

And to the same effect, *C. B. & Q. Ry.* v. *Illinois Commerce Commission*, 82 F. Supp. 368, 378:

The obligation of the railroads to carry mail is not dependent upon the interstate character of the movement. It is imposed pursuant to the Postal Clause of the Constitution (Art. 1, Sec. 8, Cl. 7) and not under the Commerce Clause.

Congress has never dealt with the transportation of the mails as a part of the problem of the regulation of common carriers. The arrangements and compensation for carrying the mails were handled by the Postmaster General from the beginning of the railroad industry. The land grant statutes provided that as a condition to the grants the railroads agreed to carry the mail at compensation fixed by Congress. The Act of March 3, 1873 (R. S. Sec. 4002) provided for the periodic readjustment of mail pay by the Postmaster General under standards thereby established, and the Act of 1876 established mail compensation to land grant roads at 80 per cent of the compensation paid to others.

After the enactment of the Interstate Commerce Act in 1887, mail pay continued to be handled by the Postmaster General under the Act of 1873 until the Mail Pay Act of July 28, 1916, Chap. 261 (39 Stat. 429-30; 39 U. S. Code, Chap. 15) provided for determination of the compensation by the Interstate Commerce Commission.

N. Y., N. H. & H. Ry. v. *U. S.*, 251 U. S. 123;
Eastern Ry. v. *U. S.*, 129 U. S. 391.

The statutory regulation of the rates and practices of the railroads as common carriers, therefore, and the contractual arrangements for railroad services with respect to the mail were developed and carried along as parallel and entirely independent governmental functions. The Mail Pay Act of 1916 did not in any sense change this basic legislative policy.

The Mail Pay Act of 1916 is not a part of the Interstate Commerce Act and has never been regarded as such. The Mail Pay Act is carried in Title 39, Chapter 15, U. S. Code under the heading "The Postal Service." The authority given in the Mail Pay Act to the Interstate Commerce Commission to fix just compensation for the mandatory services rendered by the railroads in carrying the mails, and Sec. 321 of the Transportation Act of 1940, are in no sense attempts to incorporate the transportation of mail and payment therefor into the structure of common carrier regulation and tariff rates administered by the Commission under the Interstate Commerce Act. On the contrary, the compensation for mail service imposed upon the railroads is fixed pursuant to the requirements of the Fifth Amendment.

U. S. v. *New York Central* (1929) 279 U. S. 73, 78, 79.

The basic Mail Pay Act of 1916 and Section 321 of Part II of Title III of the Transportation Act of 1940 simply provided that the Interstate Commerce Commission, as an appropriate body having the necessary expert knowledge, should be used for an independent governmental purpose with respect to the mails. This is shown by the fact that Section 321 of the Transportation Act of 1940 was not enacted as an amendment to the Interstate Commerce Act. The Transportation Act of 1940 was generally known as the Omnibus Transportation Bill. In addition to amendments to the Interstate Commerce Act, it legislated with respect to a variety of subjects not directly related to the

Interstate Commerce Act. One of these subjects is Section 321 relating to increased pay for carrying the mails.

This Court clearly recognized the special status of mail pay in *U. S.* v. *Griffin* (1938), 303 U. S. 226, in which it held that an order of the Interstate Commerce Commission fixing rates of mail pay could not be reviewed under the Urgent Deficiencies Act, as are orders made under authority of the Interstate Commerce Act.

The opinion lists numerous statutes outside the Interstate Commerce Act imposing administrative duties upon the Commission:

> "Among the statutes delegating to the Commission administrative duties in addition to those which it performs under the Interstate Commerce Act are: Postal Service: Railway Mail Pay Act . . . "—303 U. S. at 235, n. 7.

Some of these statutes expressly provide for review under the Urgent Deficiencies Act, but the Court says that as to these:

> "The orders for which review is provided by each of these statutes are like the orders under the Interstate Commerce Act fixing rates payable by shippers."—p. 237,

an entirely different function from action under the Mail Pay Act:

> "While the compensation fixed in a railway mail pay order is ordinarily measured by a rate, the ultimate question determined by the Commission is, as in the Great Northern R. Co. Case, the proper compensation to be paid by the Government to the railroad for services and the use of its property—the quantum meruit for carrying the mail."—p. 237.

Finally, the Court goes on to say that the Court of Claims has jurisdiction of suits involving mail pay under the Tucker Act:

"The absence in the Railway Mail Pay Act of a provision for judicial review and the denial of jurisdiction under the Urgent Deficiencies Act do not preclude every character of judicial review... The Court of Claims has jurisdiction of an action for the balance, as the claim asserted is one founded upon a law of Congress...

"And since railway mail service is compulsory, the Court of Claims would, under the general provisions of the Tucker Act, have jurisdiction also of an action for additional compensation if an order is confiscatory."—p. 238.

Since the petition, therefore, is addressed to a broader issue than is actually presented by this record, it is not deemed necessary to indulge in an academic discussion of the decision of the Court of Claims in *Southern Pacific Co.* v. *U. S.*, 62 Ct. Cls. 391, now sought to be reviewed for the first time after the lapse of 23 years, during which it was not questioned.

It might be pointed out, however, that another rather obvious basis for the decision below lies in the language of Section 16 (3) (a), here sought to be applied to an action in the Court of Claims.

Section 16 (3) (a) applies to "All actions at law by carriers subject to this chapter..." A suit under the Tucker Act, either in the Court of Claims or in a District Court, is not an "action at law."

McElrath v. *U. S.*, 102 U. S. 426, 440;
Ex Parte Bakelite Corp., 279 U. S. 438, 449, 452-453;
Williams v. *U. S.*, 289 U. S. 553, 573, 580-581;
Conners v. *U. S.*, 141 Fed. 16;
Lynn v. *U. S.* (1940) 110 Fed. (2d) 586.

Conclusion.

This case involves, on the record, no question of any substantial importance beyond the particular facts and parties concerned. The Solicitor General refers (pp. 15-16)

to a number of pending cases involving actions for common carrier charges under the Interstate Commerce Act, but so far as is known there are only two cases pending for the recovery of mail pay and they involve very small amounts. The minor claim involved in this case, which the Government does not now dispute on the merits, arose out of the unique and temporary situation created by the release provisions of Section 321 of the Transportation Act of 1940. Respondent is aware of only one other litigated controversy arising under that Act—*Southern Pacific Co. v. U. S.*, 107 Ct. Cl. 513, 69 F. Supp. 211; certiorari denied, 322 U. S. 757. Certainly now any other such claims would be barred by the six-year statute.

Since the decision of the Court of Claims should be sustained for the reasons herein stated, it is unnecessary to consider or determine the sole ground for review advanced by the Solicitor General. It will be time enough for this Court to consider issues not presented by this record when a proper record in cases now pending comes before it. It is respectfully submitted that the petition should be denied.

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